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Supreme Court of the United States.

OCTOBER TERM, 1969.

No.

PORT OF BOSTON MARINE TERMINAL ASSOCIATION ET AL.,

Petitioners,

v.

REDERIAKTIEBOLAGET TRANSATLANTIC,*

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the case on January 8, 1970 (A. vol. II, 15).

*The original defendants in this action were the Boston Shipping Association and thirteen corporations and partnerships representing shipping interests in the Port of Boston. The Association and all thirteen of its co-defendants accepted the order of the District Court (A. 150-151). Only the respondent here, a defendant-intervenor below, claimed an appeal to the Circuit Court (A. 151). As to the original defendants, the matter is moot.

Citations to Opinions Below.

The opinion of the Federal Maritime Commission (A. vol. I, 65-79) printed in Appendix B attached to this petition, pp. 409-420 (offset), is reported in 10 F.M.C. 409 (1967). The opinion of the District Court (A. vol. I, 147-150), printed in Appendix B, pp. 33-36, is unreported. The opinion of the Court of Appeals (A. vol. II, 9-11) printed in Appendix B, pp. 1-6 (offset), is reported in F. 2d (1st Cir. 1970).

Jurisdiction.

The judgment of the Court of Appeals was entered on January 8, 1970 (A. vol. II, 15; Appendix B, p. 6). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) (1964).

Questions Presented.

1. Where the Commission has determined that a change in incidence of certain charges under an FMC-approved agreement was not a modification of such agreement requiring further section 15 approval, whether such determination may be collaterally attacked in judicial proceedings and not on review of the Commission record.

2. Where there is power to fix terminal tariff charges under an agreement already approved by the Federal Maritime Commission under section 15 of the Shipping Act, whether a change in the incidence of charges, as to who is obligated to pay, is a modification requiring further section 15 approval.

Statutes Involved.

The statutory provisions involved are section 15 of the Shipping Act of 1916, 39 Stat. 733, as amended, 46 U.S.C. § 814 (1964), and 28 U.S.C. §§ 2341-2344 (Supp. III, 1964). They are printed in Appendix A, attached hereto, pp. 15-19.

Statement of the Case.

The action was originally brought in the Superior Court of the Commonwealth of Massachusetts in and for Suffolk County in 1965 with reference to a provision in the tariff of the plaintiffs, hereinafter called "Terminals," providing storage charges for cargo located on the Boston piers during longshoremen's strikes (A. vol. I, 1-4). The defendants, The Boston Shipping Association and thirteen other corporations and partnerships, will be hereinafter called, collectively, "Shipping."

The case was removed to the District Court by Shipping on September 1, 1965 (A. vol. I, 6-7, 27).

The jurisdiction of the District Court was invoked under 28 U.S.C. § 1441 (b) (1964), relative to actions in which a claim is alleged under the laws of the United States (A. vol. I, 6).

Among other defenses, Shipping denied in its answer that the tariff rates were legally or properly in force and further affirmatively alleged that Terminals had failed to comply with the Shipping Act (A. vol. I, 8-9).

On March 11, 1966, the District Court, at the suggestion of Terminals, entered an order (A. vol. I, 24) that the Federal Maritime Commission had initial and primary jurisdiction to determine the lawfulness and reasonableness of the practice under the item providing for the charge and that the proceeding in the Court should be stayed to allow Shipping a further opportunity to apply for and obtain the Commission's determination or ruling.

Shipping thereafter filed a complaint, bearing the docket number in the Federal Maritime Commission of 66-28, challenging the lawfulness and reasonableness of the charges in question (A. vol. I, 25).

On June 28, 1967, the Commission issued its final report and order. *Boston Shipping Association, Inc.* v. *Port of Boston*, 10 F.M.C. 409 (1967) (A. vol. I, 65-79; Appendix B, pp. 409-420).

As the Commission found, Terminals operate under F.M.C.-approved Agreement No. 8785, Article Third of which authorizes the fixing of rates and charges for wharfage, dockage, free time, wharf demurrage, and all terminal facilities and services. Article Sixth of the agreement provides that rate changes, classifications, rules and regulations adopted under the agreement and any additions or changes in them will be promptly filed with the Commission. (Pp. 410-411, *infra.*)

When cargo is on the Boston piers during longshoremen's and steamship clerks' strikes it cannot be picked up by consignees because of picket lines, and in 1964 Terminals decided to reduce the charge for wharf demurrage during such strikes to ½ cent per 100 pounds per day and to assess it as strike storage against the vessel rather than the consignee. The tariff at issue containing this change was filed with the Commission pursuant to Agreement No. 8785 (*infra*, pp. 412-413).

Briefly stated, the Commission held that assessment of strike storage charges for cargo on the Boston piers during longshoremen's strikes is subject to the jurisdiction of the Commission; that under Agreement No. 8785 a change in the tariff, shifting the charge from the cargo interests to the vessel, did not require prior approval by the Commission under section 15 of the Act; and that the assessment of such charge against the vessel for cargo which was still in free time (that is, five days following discharge

from the vessel) at the commencement of a strike does not constitute an unjust and unreasonable practice under section 17 of the Act or an undue or unreasonable prejudice under section 16 of the Act.

On August 15, 1967 (A. vol. I, 28), the District Court granted a motion of Shipping to amend the order of March 11, 1966, by adding a new paragraph 5 as follows: "All normal rights of appeal from any decision of the Federal Maritime Commission are reserved to the parties under the applicable statutes and decisions." (A. vol. I, 25.)

On September 19, 1967, Shipping filed a petition for review of the Commission's order in the Court of Appeals for the District of Columbia Circuit (A. vol. I, 31, 58). By a judgment dated March 18, 1968, that Court of Appeals dismissed the petition for lateness (A. vol. I, 31, 58, 80).

Swedish Transatlantic Line, the present intervenor, on or about September 4, 1968, filed a petition with the Federal Maritime Commission for reconsideration because of the decision of this Court on March 6, 1968, in *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Commission*, 390 U.S. 261 (1968), hereinafter called the "*VW* case" (A. vol. I, 81-87). Swedish Transatlantic alleged that it had theretofore been represented by Furness, Withy & Co., Ltd., a member of the Boston Shipping Association and a party to the F.M.C. proceedings (A. vol. I, 81). The Commission returned the petition because it was not filed within the period specified in the Commission's rules (A. vol. I, 88). No judicial review was sought by Swedish Transatlantic of this action.

On April 16, 1969 (A. vol. I, 29), Swedish Transatlantic was allowed to intervene in the proceedings before the District Court. In the answer which Swedish Transatlantic then filed (A. vol. I, 13-16), it asserted *inter alia* that the Commission's decision had misinterpreted section 15, was

"advisory" only, and was in conflict with the *VW* case (A. vol. I, 15).

On April 29, 1969, the District Court, per Charles E. Wyzanski, Jr., C.J., having before it stipulations of the facts, ruled:

> "The matters presented by the complaint are within the primary jurisdiction of the F.M.C. If defendants were not content with the determination of the F.M.C. it was incumbent on them to intervene and to appeal seasonably to the appropriate United States Court, here the Court of Appeals of the District of Columbia. This Court is not the appropriate tribunal to review directly or indirectly the F.M.C.
>
> "Even if this Court did undertake a review, it could set aside or ignore the determinations of the F.M.C. only if they were without substantial evidentiary basis, or contrary to the statute or the Constitution. Here the F.M.C. had adequate evidence. Its interpretation of the statute it administers reflects not merely expertness developed from familiarity but a construction that is in accord with what this Court deems a correct understanding of the statute." (A. vol. I, 149-150; Appendix B, pp. 35-36.)

From this decision Swedish Transatlantic alone claimed an appeal (A. vol. I, 151). On the appeal, the Court of Appeals for the First Circuit, per Bailey Aldrich, C.J., reversed the District Court, held that the Commission's decision was erroneous, and ordered judgment entered for Transatlantic (A. vol. II, 9-15; Appendix B, p. 6). On the issue of section 15, the Court said that "In the light of the strictures expressed in *VW*," the Commission's "holding seems unsupportable" (A. vol. II, 13; Appendix B, p. 5). The Court reviewed the language of this Court in

the *VW* case, which had pointed to the "expansive language" of section 15 and the Commission's "extremely narrow view" in that case. 390 U.S. 261, 272-273. The Court of Appeals stated that exceptions existed in *de minimis* or routine situations to be defined in "appropriate administrative proceedings," and then said:

> "Even this exception could not apply in the case at bar. No administrative proceedings had been held to establish guidelines under which modifications might be found '*de minimis* or routine.' Administrative standards cannot be established ex post facto. *Cf. NLRB* v. *Wyman-Gordon Co.*, 1969, 394 U.S. 759; 5 U.S.C. § 553." (A. vol. II, 13; Appendix B, p. 5.)

In footnote 4 (*ibid.*) the Court noted its belief that the "Commission's prior view, that all rate changes under such an agreement are without section 15, *Empire State Highway Transp. Ass'n, Inc.* v. *American Export Lines, Inc.*, 1959, 5 F.M.B. 565, *affirmed, Empire State Highway Transp. Ass'n, Inc.* v. *Federal Maritime Board*, D.C. Cir., 2961, 291 F.2d 336, *cert. denied* 368 U.S. 931, fell with the overruling of the Commission in *VW, supra.*"

Argument.

I. The Court below was Not Sitting as a Reviewing Court with Reference to the Commission. By Allowing Collateral Attack on the Commission's Decision, the Court below so Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for Exercise of this Court's Power of Supervision.

The opinion below gave short shrift to the Commission's determination in 10 F.M.C. 409 even though no appeal was taken from that determination.

As the District Court held (A. vol. I, 149; Appendix B, *infra*, p. 35), the Commission had primary jurisdiction. Swedish Transatlantic, the respondent here, was represented throughout the Commission proceedings by counsel for Furness, Withy & Co., Ltd. Neither it nor Furness, Withy exhausted the administrative remedies available. See the provisions for intervention in 5(1) of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.72, and the judicial review procedure set forth in 28 U.S.C. §§ 2341-2344 (Supp. III, 1964).

Not only did the Court of Appeals permit a collateral attack on the Commission's ruling, but it also gave the Commission's ruling even less weight than it should have had on direct review. The question whether a change in tariff under a section 15 agreement is a "modification" of the agreement needing further approval is one of degree. *Empire State Highway Transportation Association, Inc.* v. *Federal Maritime Board*, 291 F. 2d 336, 339 (D.C. Cir. 1961), cert. denied 368 U.S. 931. See *Persian Gulf Outward Freight Conference* v. *Federal Maritime Commission*, 375 F. 2d 335, 339 (D.C. Cir. 1967):

> "A Commission determination that the conference action falls within or without the approved agreement must be given due deference by a reviewing court. See Consolo v. Federal Maritime Commission, 383 U.S. 607, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966)."

If that is so for a reviewing Court of Appeals under the Hobbs Act, it obviously would be worse for a District Court, which does not sit in review of the Commission's determinations, to undermine what was done in the agency proceedings.

II. THE ISSUE DECIDED BELOW, THAT A CHANGE IN INCIDENCE OF TERMINAL TARIFF CHARGES PROMULGATED UNDER AN APPROVED F.M.C. AGREEMENT, CONSTITUTES A "MODIFICATION" OF THE APPROVED AGREEMENT WHICH MUST ITSELF BE APPROVED, IS AN IMPORTANT QUESTION OF LAW WHICH HAS NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT.

The substantive issue is important because so much of the maritime business in the United States is done by the use of tariffs issued under FMC-approved agreements. In a consistent line of cases there have been important tariff changes adopted under such agreements which have been held not to be "modifications" requiring separate section 15 approval. The same view has generally prevailed since *Section 15 Inquiry*, 1 U.S.S.B. 121 (1927).

In *Empire State Highway Transportation Association, Inc.* v. *American Export Lines*, 5 F.M.B. 565 (1959), for example, it was argued that the issuance of Tariffs Nos. 3 and 4 under a section 15 agreement among the pier operators in the Port of New York constituted new agreements or modifications thereof which required specific approval under section 15 before being made effective. The nature of the changes in *Empire State* was extensive and not merely limited to the level of rates. In fact, the complainants' argument was that Tariffs Nos. 3 and 4 "not only set forth the rates and charges, but define the nature of the terminals' obligations, adopt rules with respect to their liability, describe the conditions under which others might load and unload trucks, and generally set forth the manner and method by which trucks may be loaded and unloaded" (5 F.M.B. at 585). The Board held:

> "We agree with the examiner and find that the tariffs are not modifications of the basic agreement or new agreements, within the meaning of section 15. The

issuance of tariffs, including rates, charges, rules, and regulations covering the application of the tariffs, were authorized and contemplated by the approved basic agreement." (5 F.M.B. at 585).

In *Empire State Highway Transportation Association, Inc.* v. *Federal Maritime Board,* 291 F. 2d 336 (D.C. Cir. 1961), cert. den. 368 U.S. 931, in holding on a petition for review that the Federal Maritime Board correctly ruled that tariff increases and changes in regulations embodied in a Tariff No. 5 did not constitute a new section 15 agreement or modification under Agreement No. 8005, the Court approved the language quoted above from 5 F.M.B., observing (291 F. 2d at 339):

> "Thousands of rate changes have been agreed upon in concert by conference members in the maritime and related industries under the authority of approved conference agreements, and we are cited to no instance in which conventional rate changes have been held by Board or court to be unlawful because unaccompanied by prior Board approval."

The matter was discussed again in *Agreement No. 9025: Middle Atlantic Ports Dockage Agreement,* 8 F.M.C. 381 (1965), where the examiner had concluded that, despite the Commission's having approved the terminals' conference agreement, which authorized discussion of and agreement on rates, charges and practices, the fruits of these discussions would have to be filed with and approved by the Commission under section 15. The Commission overruled the examiner and stated:

> "Since Agreement 9025 does not itself impose any charges, it is impossible on this record to assess its effect on carriers, ports, and the commerce of the

United States with any real degree of accuracy. The Commission's power over section 15 agreements, however, consists not only of initial approval, but of continuing supervision; and if at some time in the future, rates, charges, classifications, rules, or regulations are established pursuant to the agreement which violate the fair and reasonable standards of the Act the Commission may protect the public interest by withdrawing its approval of the basic agreement itself or by requiring its modification." (8 F.M.C. at 386.)

We believe and assert that port terminal operators' conferences in the United States have generally tried to operate on these principles in reliance upon the Commission's rulings. The section 15 agreement never shows what the charges will be, nor does it show who will be assessed the charges. The Commission has plenty of power to correct any abuses in tariffs either on its own initiative (tariffs must be filed with the Commission) or by complaint.

If this generally prevailing view of the law is wrong, which the present petitioners doubt, this Court should so declare. The present situation is one of serious confusion between what the Commission has required traditionally as against the opinion of the Court of Appeals in an area of enormous importance to the commercial and maritime interests involved.

III. The Court's Decision below Conflicts in Principle with Empire State Highway Transportation Ass'n, Inc. v. Federal Maritime Board, 291 F. 2d 336 (D.C. Cir. 1961), cert. den. 368 U.S. 931, as Well as with Administrative Practice of the F.M.C.

The District of Columbia Circuit Court of Appeals in the *Empire State* case noted that there were many tariff

changes under approved agreements. As the Federal Maritime Board argued in its brief in that case, quoted with approval by the Court, 291 F. 2d at 339, "'A tariff change and modification of the basic agreement may sometimes be a matter of degree.'"

The conflict between *Empire State* and the opinion below is a genuine one, even though *Empire State* itself largely involved a rate level change rather than a change of incidence. In *Empire State* the tariff, as we note *supra*, p. 9, contained many rules and regulations. The Court quoted from the Commission's report as follows:

> "'We do not separately consider the regulations and practices, for if, as we hold, the rate increase is valid the same reasoning carries with it the validity of these particular regulations and practices.'" (291 F. 2d at 338, footnote 2.)

IV. The Court below Misconstrued Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, 390 U.S. 261 (1968), by Applying that Decision to a Case where the Tariff Item had been Adopted under an Approved F.M.C. Agreement.

The *VW* case was the basis of the First Circuit's opinion herein. We submit that the case was misapplied by the Court below.

In footnote 26 in *VW*, 390 U.S. at 277, this Court stated with apparent endorsement that

> "Prior to this 1966 amendment, the Commission had taken some steps to protect itself from *de minimis* filings. In *Section 15 Inquiry*, 1 U. S. S. B. 121 (1927), the Commission held 'routine' intraconference changes and transactions not subject to § 15."

Nothing whatever in the *VW* case suggests that this Court intended there to overrule the whole line of Commission authorities beginning with *Section 15 Inquiry, supra*. On the contrary, there was no section 15 agreement in *VW*, and the agreement there was not even an intraconference change. The facts and the *ratio decidendi* of *VW* are entirely consistent with the Commission's *Boston Shipping* decision herein.

If the Commission had to approve every tariff change of incidence or new item adopted under an already approved section 15 agreement, it would mean approving at least the first tariff issued under the agreement and all changes of incidence or new regulations adopted thereafter. This is so because the conference agreement itself does not show to whom charges will be made or what regulations will be adopted. The Commission's practice is to receive such tariffs for filing. It has full power to entertain complaints or commence investigations if any practices in the tariffs are unreasonable and indeed to withdraw its initial approval of the basic agreement. Disposition of such complaints and investigations is an important part of the Commission's function under the Shipping Act.

Contrary to what the First Circuit rules, see A. vol. II, 13; Appendix B, p. 5, the "routine" matters referred to in *VW*, 390 U.S. at 276, have indeed been determined by the Commission "after appropriate administrative proceedings." The Commission's action in approving Agreement No. 8785 was an administrative proceeding, and its holdings in cases from *Section 15 Inquiry, supra*, through *Boston Shipping Association* v. *Port of Boston*, 11 F.M.C. 1 (1967), constitute such proceedings. It is difficult to perceive how the Commission could have proceeded otherwise,

and petitioners submit that *VW* was not intended by this Court to compel the Commission to revise so significant a part of its administrative functions.

Conclusion.

For the foregoing reasons the petition for certiorari should be granted.

Respectfully submitted,

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Appendix A.

46 U.S.C. § 814.

§ 814. *Contracts between carriers filed with Commission; definition of "agreement"; approval, disapproval, etc. by Commission; unlawful execution of agreements; conference agreements and antitrust laws exemptions; civil actions for penalties; terminal leases exemption.*

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character or freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the

detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a

change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1–11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 813a of this title shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action: *Provided, however,* That the penalty provisions of this section shall not apply to leases, licenses, assignments, or other agreements of similar character for the use of terminal property or facilities which were entered into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after the enactment of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or canceled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly approve, disapprove, cancel, or modify each such agreement in accordance with the provisions of this section. (As amended Oct. 3, 1961, Pub. L. 87-346, § 2, 75 Stat. 763; Feb. 29, 1964, Pub. L. 88-275, 78 Stat. 148.)

§2341. *Definitions.*

As used in this chapter—

(1) "clerk" means the clerk of the court in which the petition for the review of an order, reviewable under this chapter, is filed;

(2) "petitioner" means the party or parties by whom a petition to review an order, reviewable under this chapter, is filed; and

(3) "agency" means—

(A) the Commission, when the order sought to be reviewed was entered by the Federal Communications Commission, the Federal Maritime Commission, or the Atomic Energy Commission, as the case may be;

(B) the Secretary, when the order was entered by the Secretary of Agriculture; and

(C) the Administration, when the order was entered by the Maritime Administration. (Added by Pub. L. 89–554, § 4(e), Sept. 6, 1966, 80 Stat. 622.)

§2342. *Jurisdiction of court of appeals.*

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) such final orders of the Federal Maritime Commission or the Maritime Administration entered under chapters 23 and 23A of title 46 as are subject to judicial review under section 830 of title 46; and

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title. (Added by Pub. L. 89–554, § 4(e), Sept. 6, 1966, 80 Stat. 622.)

§ 2343. *Venue.*

The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit. (Added by Pub. L. 89–554, § 4(e), Sept. 6, 1966, 80 Stat. 622.)

§ 2344. *Review of orders; time; notice; contents of petition; service.*

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of—

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt. (Added by Pub. L. 89–554, § 4(e), Sept. 6, 1966, 80 Stat. 622.)

Appendix B.

FEDERAL MARITIME COMMISSION

No. 66-28

THE BOSTON SHIPPING ASSOCIATION, INC., ET AL.

v.

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, ET AL.

Decided June 23, 1967

Assessment of "strike storage" charges for cargo remaining on premises of terminal during longshoremen's strike is subject to the jurisdiction of the Commission as a practice within the meaning of section 17 of the Shipping Act, 1916.

A change in the terminal tariff rule governing the assessment of "strike storage" which shifted charge from cargo to vessel did not require prior approval by the Commission under section 15, Shipping Act, 1916, where rule is contained in a tariff filed with the Commission under an existing approved section 15 agreement; such change constituting neither a modification to the already approved basic agreement nor a new agreement within the meaning of section 15.

The assessment of the "strike storage" against the vessel for cargo still in "free time" when the strike begins does not constitute an unjust and unreasonable practice within the meaning of section 17, Shipping Act, 1916.

While the assessment by a terminal of a charge against the vessel for services rendered to the cargo for benefit of the consignee raises issues under section 17 as to the justness and reasonableness of the allocation it does not constitute an undue or unreasonable prejudice under section 16 since the cargo and vessel are not users of the same service.

Cargo of the consignees was "prevented from removal" within the meaning of the strike storage provision of respondents' tariff by the longshoremen's strike and the application of that provision for the period in question did not constitute an unjust and unreasonable practice within the meaning of section 17, Shipping Act, 1916.

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Donald J. Brunner, Esq. and *Samuel B. Nemirow, Esq.*, Hearing Counsel.

292-412—68

REPORT

BY THE COMMISSION (John Harllee, *Chairman;* Ashton C. Barrett, *Vice Chairman;* James V. Day, George H. Hearn, *Commissioners*):*

This proceeding arises out of a complaint filed April 21, 1966, by the Boston Shipping Association. Hearings were held before Examiner Benjamin A. Theeman who issued his decision February 17, 1967. Oral argument was held May 11, 1967. The complainant, the Boston Shipping Association, Inc., is a nonprofit Massachusetts corporation, whose members are ocean steamship companies, their agents, or stevedores, while the respondent (PBMTA) is an association of "other persons" subject to the Shipping Act, 1916, each of which owns or operates a marine terminal in connection with a common carrier by water. The complainant alleges that respondent has violated section 15 of the Act by putting certain tariff modifications into effect without first securing the approval of the Commission, and sections 16 and 17 of the Act by unjustly assessing against the vessel the charge for so-called "strike storage" of cargo during strikes of the vessel employees instead of assessing it to the cargo as had previously been the practice. The Examiner found violations of sections 16 and 17, but not section 15. Respondent and intervenor hearing counsel have taken exception to the Initial Decision and complainant has replied. Our conclusions differ somewhat from those of the Examiner.

FACTS

Respondent PBMTA operates under approved Agreement No. 8785, Article Third of which provides that the agreement authorizes the fixing of rates and charges for wharfage, dockage, free time, wharf demurrage, and all terminal facilities and services. Article Sixth of the agreement provides that rate charges, classifications, rules and regulations adopted under the agreement and any additions or changes in them will be promptly filed with the Commission.

Pursuant to Agreement No. 8785, PMBTA issued Terminal Tariff No. 1, effective July 1, 1962. This tariff provided, among other things, for wharfage,[1] wharf demurrage,[2] dockage,[3] and free time.[4] It con-

*Commissioner Fanseen did not participate.

[1] The term "wharfage refers to the charge assessed against all cargo passing or conveyed over, onto or under wharves or between vessels or overside vessels when berthed at pier or wharf. Wharfage is solely the charge for use of pier or wharf and does not include charges for any other service."

[2] The term "wharf demurrage refers to the charge assessed against cargo remaining on a pier or wharf after the expiration of free time."

tained no provision specifically dealing with strike storage. Under the tariff as originally filed, dockage was assessed against the vessel on general cargo at 20 cents a ton; wharf demurrage was assessed on import cargo at 2½ cents per 100 pounds per day. Free time of 5 days was allowed on import cargo, and 7 days allowed on export cargo. There is no issue presented as to the reasonableness of these periods.

When cargo was "prevented from removal by factors beyond the consignees' control such as strikes, weather conditions, or similar situations affecting the entire Port area" wharf demurage was assessed on cargo at a reduced rate of 1 cent per 100 pounds per day.[3] All the services at the terminals operated by respondents were governed by these provisions and subsequent amendments made during the period of record.

Ocean freight rates on general cargo into the Port of Boston cover transportation from a place of rest to a place of rest which is generally a point and place in a designated area inside the pier shed to which cargo is removed from where it has been landed under ship's hook. It is the vessel's obligation to move the cargo to the place of rest. This is accomplished by stevedoring companies performing under contract with the vessels and under the direction of the chief clerk, an employee of the vessel. The longshoremen employees of the stevedore and the clerks belong to union locals affiliated with the ILA.

On inbound shipments, the vessel sends an arrival notice to the consignee who usually receives it the morning the vessel docks, but in no event later than the time the vessel finishes unloading. The notice contains the date that free time will expire. The major portion of the cargo is picked up by the consignee during free time. The usual procedure is for a truckman or a railroad freight handler on the consignee's behalf to arrive at the pier with an order for the cargo; the cargo is tallied by a clerk, an employee of the vessel; and while being tallied, the cargo is loaded by the consignee's representatives, one of whom signs the tally. The procedure is reversed but substantially similar in the case of export cargo. Wharf demurrage is assessed against the consignee for cargo left on the pier after free time expires. In some instances, cargo in demurrage is not moved from the place of rest. In others, the terminal moves the cargo to another area of the terminal to place it in demurrage or storage.

[1] The term "dockage refers to the charge assessed for the service of providing space alongside of wharf, pier or seawall structure for the docking or berthing of watercraft, or for the mooring thereof, or other watercraft docked."

[2] The term "free time refers to the period which cargo is allowed to remain on a pier free of charge, immediately prior to loading of the vessel or subsequent to its discharge from a vessel."

[3] The terminal tariff further provided that "When removal of cargo is prevented by strike of terminal employees no wharf demurrage will be assessed." (Emphasis ours).

Each of the complainants enjoys the continuous or exclusive use of an assigned pier for the berthing of its vessels. Before all the cargo unloaded from one vessel is delivered or removed from the pier, another vessel will have berthed and unloaded its cargo. This process is repeated as succeeding vessels unload. Thus, there regularly exists on the pier a mix of general cargo in different stages of discharge and delivery, some in free time and some in wharf demurrage. Because of this, complainants do not consider that their responsibility toward the cargo on their piers ends at the expiration of free time. Rather, they believe that they should use average care to see that cargo is delivered in the same condition in which it was received. Complainants employ watchmen to guard against such things as pilferage, and complainants insure the cargo while it is on their piers. Complainants consider delivery takes place when they receive a signed receipt of some kind from the party that next takes over the cargo. The record reveals that complainants consider that when this occurs, their obligation ceases.[6]

The terminal maintains guards to police the terminals, and service employees for the upkeep and maintenance of the terminal piers and premises. Both the terminal's guards and the complainant's watchmen belong to unions not affiliated with the ILA.

In August of 1964, PBMTA received a letter from one of its members, the Massachusetts Port Authority, stating in part:

> Over the years terminal operators and the Port of Boston have been severely criticized by consignees of import cargo or the shippers of export cargo when wharf demurrage charges are assessed during strike periods. Many times, it seems almost useless to advise them that a reduction in charges is established in the tariff for that purpose.

Shortly after this letter, PBMTA decided to reduce wharf demurrage to ½ cent per 100 pounds per day and to assess it against the vessel instead of the consignee. In September 1964, BSA found out about the proposal to shift the charge to the vessel and protested by telegram to PBMTA. In the next few months, two or three meetings took place, which ended with the parties still at odds. PBMTA told BSA that it would continue to assess the charge against the vessel and that if there was any complaint to file it here with the Commission. BSA's reply was that it would not pay the charge. A longshoremen's strike that had been brewing for about a month in the Port of Boston commenced on September 30, 1964. Tally clerks and other clerks of the

[6] Other common carriers in Boston whose schedules provide only an occasional call at a particular pier operate differently and discharge at the pier ends their operation there. Cargo left on the pier at the end of free time would be turned over to the terminal for storage.

BSA also struck. On November 18, 1964, wharf demurrage assessed against the vessel for cargo remaining on the pier during a strike of the vessel's employees or employees of the agent of the vessel was renamed "strike storage." On December 21, 1964, this "strike storage" charge was eliminated from the wharfage section of the tariff and set aside as a separate item. On October 1, 1964, a court injunction stayed the strike, but it began again on January 11, 1965, and lasted 33 days. During this time, truckmen and railroad men representing the consignees refused to enter the terminal and pick up cargo. All guards and watchmen remained on duty during the strike.

Pursuant to the tariff, strike storage was assessed against complainants. Upon refusal of complainants to pay the assessed charges, PBMTA brought an action in the U.S. District Court, District of Massachusetts. The Court stayed proceedings, holding that the matter was within the primary jurisdiction of the Commission. The present complaint resulted.

DISCUSSION

A. *Prior Approval of the Strike Storage Provision Under Section 15*

A threshold issue [7] to be disposed of before dealing with the validity of the strike storage charge under sections 16 and 17 is the question of whether the tariff revisions containing the present strike storage rule required our approval under section 15 prior to their implementation. The Examiner found no merit in this contention of complainant and we agree.

Prior to the present rule, the tariff contained a provision providing for reduced "wharf demurrage" to be assessed against the cargo in the event removal of it was prevented by a strike. The present charge is in effect this same wharf demurrage though now called strike storage. Thus, the only real change effected by the controversial provision is the shift of the charge from cargo to vessel.

Approval of Agreement No. 8785, the basic agreement under which the terminals operate, assumed that the various costs of providing terminal services would be allocated as between users of those services. The authority granted under the agreement to jointly fix charges carried with it the continued authority to properly allocate those charges,

[7] Taking the position that this is a ratemaking case, complainants also contended that we were without jurisdiction. They do not, however, challenge the level of the strike storage charge and their only concern is with its assessment against them. That the proper allocation of the costs of providing terminal services as between users of those services is a matter within our jurisdiction under section 17 is too well settled to be disputed now. *Practices, etc., San Francisco Bay Area Terminals*, 2 U.S.M.C. 588 (1941) aff'd *California* v. *U.S.*, 320 U.S. 577 (1944); *Free Time and Demurrage Charges—New York*, 3 U.S.M.C. 89 (1948).

and while a particular change in allocation may be an unreasonable practice under section 17 or unlawful under section 16 or some other section of the Act, it does not constitute a new agreement or a modification to the existing agreement calling for a new anticompetitive, monopolistic or rate-fixing scheme not contemplated in the original agreement. See *International Packers, Ltd.* v. *F.M.C.*, 356 F. 2d 808, 810 (C.A.D.C. 1966); *Agreement No. 9025: Middle Atlantic Ports Dockage Agreement*, 8 F.M.C. 381, 384 citing *Empire State Highway Transportation Association* v. *Federal Maritime Board*, 291 F. 2d 336 (C.A.D.C. 1961) c.d. 368 U.S. 931 (1961). For changes outside the scope of approved agreements and needing prior approval, see those items listed in *The Persian Gulf Outward Freight Conf. (Agr. 7700)—Establishment of a Rate Structure Providing for Higher Rate Levels for Service via American-Flag Vessels versus Foreign-Flag Vessels* . . . Docket 66–27—10 FMC 61; and the discussion on the subject in *Contract Between the North Atlantic Mediterranean Freight Conference and the United Arab Co. etc.*, Docket No. 66–3, 9 FMC 431. No prior approval under section 15 was required.

B. *The Allocation of the Strike Storage Charge Under Section 17*

As "other persons subject to [the Shipping] Act"[3] terminals are required by section 17 of that Act to establish "just and reasonable regulations and practices relating to or connected with the receiving handling or storing of property". We are authorized by section 17 whenever we find a regulation or practice to be unjust or unreasonable, to prescribe a just and reasonable one.

Terminal operators form an intermediate link between the carriers and the shippers or consignees. In consequence the terminal operators perform some services for the carriers and other services for the shippers. *Terminal Rate Increases-Puget Sound Ports*, 3 U.S.M.C. 21, 23 (1948). A just and reasonable allocation of charges under section 17 is one which results in the user of a particular service bearing at least the burden of the cost to the terminal of providing the service. *Practices, Etc. San Francisco Bay Area Terminals*, 2 U.S.M.C. 588 (1941) aff'd. *California* v. *United States*, 320 U.S. 577 (1944); *Investigation Free Time Practices-Port of San Diego*, 9 F.M.C. 525 (1966). Where the users of a particular service do not provide their share of essential

[3] Section 1 provides:
"The term 'other person subject to this Act' means any person not included in the term 'common carrier by water' carrying on the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water."

terminal revenues a disproportionate share of the burden is unjustly and unreasonably shifted to users of other terminal services. *Practices, Etc. San Francisco Bay Area Terminals, supra*, see also Terminal *Rate Structure-California Ports*, 3 U.S.M.C. 57 (1948). In view of the multiplicity of methods used by terminal operators in furnishing facilities to carriers, shippers and consignees, it is essential, in considering whether a particular allocation or assessment is just and reasonable, to first determine for whom the service is performed. The necessary distinction to be made is between those services which are attributable to the transportation obligation of the carrier and those which are not, the latter normally being performed for the shipper or consignee. *Terminal Rate Increases-Puget Sound Ports, supra*. This, of course, involves a clear delineation of the obligations of the carrier to the shipper or consignee in performing its transportation service.

Complainants' simplistic characterization of a common carrier's duty as the "duty to carry" does not go far enough, and the carrier's obligation does not end with the deposit of the goods upon a "reasonable pier." The carrier must also "tender for delivery" which obligation requires that the carrier unload the cargo onto a dock, segregate it by bill of lading and count, put it at a place of rest on the pier so that it is accessible to the consignee and afford the consignee a reasonable opportunity to come and get it. *American President Lines, Ltd.* v. *Federal Maritime Board*, 317 F. 2d 887, 888 (D.C. Cir. 1962). Once this has been done, and absent a special contract, the carrier's transportation obligation is discharged.

In discharging its obligation to tender for delivery, the carrier must provide a convenient and safe place to receive the cargo from the shipper and for the consignee to accept delivery. *Terminal Rate Increases—Puget Sound Ports*, 3 U.S.M.C. 21 (1948). Thus, the carrier must provide adequate terminal facilities *Intercoastal Rates to and from Berkeley*, 1 U.S.S.B.B. 365 (1935), *Intercoastal Investigation 1935*, 1 U.S.S.B.B. 400 (1935). A carrier may not divest itself of this obligation, *Terminal Rate Increases—Puget Sound Ports, supra*, though it may contract for the facilities of another person such as a terminal operator in which case the terminal operator is in effect the agent of the carrier. *Free Time Practices—Port of San Diego*, 9 F.M.C. 325 (1966).

At Boston, "free time", or the period reasonably required to allow a consignee to pick up his cargo, appears in the respondent terminals' tariff and no comparable provision appears in the carrier's tariff. The piers and wharfs are actually provided by respondents. The obligation to provide free time and effective facilities to make that free time

meaningful and realistic remains the carrier's. At Boston, the free time period is 5 days. Once the cargo has remained on the pier for these 5 days, the transportation obligation of the carrier is ended and the services performed by the terminal for the carrier are also at an end. Any other services performed by the terminal in receiving, handling, storing, or delivering the property are normally performed for the consignee or the shipper.

With the foregoing in mind, we move to a discussion of the application of the strike storage provision during the period in question. The strike storage rule clearly would apply to (1) cargo on the pier which is in free time when the strike begins; and (2) cargo which is on the pier in wharf demurrage when the strike begins.[9]

1. *Cargo in Free Time*

When the cargo is in free time, the terminal facility—the pier—is being provided by the terminal to the carrier so that the carrier may discharge its full transportation obligation to the consignee. It is the duty of the carrier to provide this service to the consignee and it has chosen to do so through an arrangement with the terminal. No one would argue that the carrier should pay the terminals' cost of providing the pier for the free time period itself. Why then should the consignee pay for the interim period of the strike? The Examiner would appear to conclude that the consignee should pay for two reasons (1) that "the terminal services rendered, that is, the supplying of the pier and the attendant services as well as the free time involved were being supplied to the cargo"; and (2) that "the reasons advanced by PBMTA for making the change [from consignee to vessel] were not valid".

That the services in question were supplied to the cargo is in one sense a valid statement. In transportation all the services, be it the actual carriage or the variety of attendant services, are performed for or supplied to the cargo, the ultimate object being to move the cargo from the point of origin to its ultimate destination. But the cargo cannot be divorced from the persons owing obligations to it. In the past when considering the proper allocation of terminal charges, it has been customary to divide terminal services into two general categories: those performed for the "vessel" and those performed for the "cargo". While we have no desire to change this customary usage, it must always be borne in mind that the cargo is not some separate

[9] The Examiner concluded that a broad reading of the rule could lead to its application to cargo the terminal had signed for and removed from the pier used by the vessel, presumably, to another pier, since strike storage is defined as a "charge assessed against cargo on *the pier* at the commencement of a strike." (Emphasis ours). We do not read the rule as applying to cargo removed from the pier by the terminal itself after it has signed for the cargo. In any event, as will appear later, an attempt to apply the rule to such cargo would, as respondents themselves appear to recognize, constitute a reasonable practice.

entity which is itself capable of paying for services rendered. The charges must always be paid by some person standing in a prescribed relationship to the cargo.[10] Thus, where the terminal is the intermediate link between the carrier and the shipper or consignee, one of these two persons must pay the terminal's cost of providing the services rendered. The question here is which of these two should pay the charge in issue.[11] We would place the burden upon him who at the time of the strike owes an undischarged obligation to the cargo. Thus, where the cargo is in free time and a strike occurs, it is the vessel which has yet to discharge its full obligation to tender for delivery and it is to the vessel that the terminal is at this point in time supplying the attendant facilities and services. It is therefore just and reasonable to require the vessel to pay the cost of the supervening strike which renders the discharge of that responsibility impossible.

After reviewing respondents' past practices under the old reduced wharf demurrage provision which governed charges for storage during a strike, the Examiner concluded that the reasons advanced by respondents for shifting these charges from the consignee to the vessel were invalid. Thus, in the Examiner's view, "The terminals are arbitrarily and unfairly charging the vessel strike costs * * * for services not rendered to them." Respondents contend that the Examiner has misconceived the past practice. We find it unnecessary to resolve this dispute.

We have already concluded that the charge in question was for a service rendered the vessel in order to allow the vessel to discharge its duty to tender for delivery. Therefore, the practice is a just and reasonable one under section 17. Its validity under section 17 is not affected by respondents' motives. A bad motive does not make a reasonable allocation unreasonable just as a good motive does not make an unreasonable allocation reasonable. The nature of the practice itself is of course controlling.

2. *Cargo in Demurrage*

Once free time has expired, the vessel's transporation obligation has ended. Absent a special contract, the carrier has done all that its transportation obligation requires it to do. Thus, in our view, it is only just and reasonable that the consignee, who has failed to avail himself of the opportunity to pick up his cargo during free time, should bear

[10] We can only assume that convenience alone led to the substitution of "cargo" for the term "shipper or consignee" depending *inter alia* whether the shipment was outbound or inbound.

[11] No party to this complaint case has argued that the terminal itself should absorb the cost of providing strike storage and the record here is silent as to the terminal's ability to do so.

the risk of any additional charges resulting from a strike occurring after free time has expired. The fact that the carrier may remain liable for loss or damage to the cargo due to its own negligence, *American President Lines* v. *F.M.B.*, 317 F. 2d 887 (C.A.D.C. 1962) in no way relieves the consignee of its duty to pick up the cargo or bear those risks incidant to a failure to do so. Thus, we conclude that as to cargo which is in demurrage when the strike begins, it is an unjust and unreasonable practice within the meaning of section 17 to assess strike storage against the vessel.

C. *Application of the Strike Storage Rule as a Violation of Section 17*

The Examiner further concluded that the language of the strike storage itself rendered it inapplicable to the situation here in question. Pointing to the fact that under the rule itself, strike storage was assessable only on cargo "prevented from removal" by a strike, the Examiner found that "The refusal by consignee's employees was voluntary, and evidently was not pressed, possibly in order to avoid further complications and danger." The key to the Examiner's conclusion would seem to be his finding that a "longshoremen's strike does not present a legal obstacle preventing the agents or employees of the consignee from picking up its cargo." [12]

To adopt the Examiner's conclusion is to place a strained and unnatural interpretation upon the language of the rule. As the Examiner himself points out, "The parties to this proceeding have been acting under the assumption that the longshoremen's strike prevented the consignee from receiving his cargo." Thus, only the Examiner has construed the language to mean "legal obstacle." Giving the language "the fair and reasonable construction required," *Thomas G. Crowe* v. *Southern S.S. Co.*, 1 U.S.S.B. at 147 (1929), we do not agree that the language "prevented from removal" means or was intended to mean "prevented from removal by a legal obstacle." We have long ago recognized the "physical and moral force of picket lines" and the impact of a strike which effectively prevents consignees from removing their shipments," *Free Time and Demurrage Charges—New York*, 3 U.S.M.C. 89 (1948).[13] When the truckers and railroad men upon whom the consignees must rely to pick up their cargo refuse to enter the terminal because of the longshoremen's strike, it can hardly be said that the consignee's "refusal" to pick up their cargo was "voluntary." We

[12] The Examiner cited section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act and certain cases dealing with "secondary boycotts" in support of this conclusion.

[13] That the *Free Time and Demurrage* case involved a trucker's strike as opposed to a longshoremen's strike is of no consequence to our conclusions here.

therefore conclude that the strike storage rule was applicable to the situation in issue and of itself did not constitute an unreasonable practice under section 17.

D. *The Assessment of Strike Storage Under Section 16 First*

There remains only the Examiner's conclusion that a violation of section 16 first had been committed. Citing only our recent decision in *Investigation of Free Time Practices—San Diego*, 9 F.M.C. 525 (1966), the Examiner concluded that the *San Diego* decision "would seem to make any undercharge or overcharge to any user, preferential or prejudicial * * * ." To the Examiner, "It follows that a section 16 violation exists in the present instance since the vessel is being charged for a service to the cargo even though the cost allocation system under which the terminal operates has not been shown." The Examiner then suggests that we "* * * may wish to consider whether a distinction should be drawn between the *San Diego* case and the present one" insofar at least as *San Diego* would appear to apply to different classes of users of terminal services, i.e. between cargo and vessel.

The distinction to be drawn is not between the *San Diego* case and this one but between section 16 and section 17.[14] The practice involved in *San Diego* was the granting of excessive free time to shippers and consignees. We discussed the validity practice under both sections 16 and 17. Under section 16, we stated that because the business practices of some shippers would not allow them to take advantage of the full free time granted, the obstensible offer to all shippers was illusory and the practice worked preference and prejudice within the meaning of section 16.[15] We further pointed out that the practice could be an unreasonable one under section 17 since by providing valuable services free or at reduced rates, the terminal was placing a disproportionate share of the burden of providing essential terminal revenues upon users of other services.

Thus, under section 16, there were two users of the same service—free time. In the present case, this ingredient is missing for the very question in issue is which of the two interests, cargo or vessel, is the actual user of the service in question. The distinction to be made is not between classes of users [16] but whether there are two interests seeking

[14] The Examiner felt that "Under such circumstances, any distinction between section 16 and section 17 seems to be eliminated insofar as terminals are concerned."

[15] We also pointed out that because of the nature of the service free time or free storage, it was unnecessary to show any competitive relationship between particular shippers or consignees. See e.g. *New York Foreign Freight F. & B. Assn. v. F.M.C.*, 337 F. 2d 289 (1964).

[16] We can for example see no reason for a terminal to charge say a shipper one rate for pure storage and carrier yet another rate for such storage.

the same or substantially the same service. Here the service is for either the consignee or the vessel depending upon whether the particular cargo is in free time or demurrage. While the particular assessment of strike storage may result in an unreasonable practice under section 17, it does not in the situation at hand result in a violation of section 16.

On the basis of the foregoing, we conclude that the assessment of strike storage against the vessel for cargo on which free time has expired constitutes an unjust and unreasonable practice under section 17 of the Shipping Act, 1916, and respondents will be ordered to amend their strike storage rule accordingly.

By the Commission.

ORDER

The Commission has this day made and entered a report stating its findings and conclusions herein, which report is made a part hereof by reference, and

It is ordered, That respondents herein shall amend their Terminal Tariff No. 1 in a manner not inconsistent with the Commission's decision herein.

By the Commission.

[SEAL] (Signed) THOMAS LISI,
Secretary.

U.S. GOVERNMENT PRINTING OFFICE: 1968

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, ET AL.,
Plaintiffs

v.

Civil Action
No. 65-640-W

BOSTON SHIPPING ASSOCIATION, INC., ET AL
Defendants

REDERIAKTIEBOLAGET TRANSATLANTIC,
Defendant-Intervener

OPINION
April 29, 1969

WYZANSKI, Chief Judge

This action was originally brought in the Superior Court of the Commonwealth of Massachusetts for declaratory relief and an order for payment, both referring to a provision in plaintiffs' tariff providing storage charges for cargo located in Boston during longshoremen's strike.

Pursuant to 28 U.S.C. Sec. 1441 b, defendants petitioned for removal of the action to this Court on the ground that the "claim" sued upon is one "arising under the . . . laws of the United States."

The complaint, called a petition under state practice, alleges that Port of Boston Marine Terminal Association (PBMTA) is an association existing under Federal Maritime Commission Agreement No. 8785, that the members furnish wharfage, dock, and other terminal facilities in connection with common carriers by water, and that the applicable tariff is filed with the Maritime Commission. The tariff is said to have been adopted under Section 15 of the Shipping Act, 1916. Relief sought was (1) a declaration that under item 15 of Section III of the tariff, Boston

Shipping Association and other defendants are obliged to pay strike charges as they accrue, and (2) an order for payment of charges already accrued during a 1965 dock strike.

At an early stage this Court held that the case is one within this Court's jurisdiction under 28 U.S.C. Sec. 1441 b. See *Wells Fargo & Co.* v. *Cuneo,* 241 Fed. 726 (S.D.N.Y.); *McGoon* v. *Northern Pacific Ry. Co.,* 204 Fed. 998 (D.N.D.); Hart & Wechsler, *The Federal Courts and the Federal System,* pp. 727-733, 744-747, 749-752, 763-769, 774-777. Plaintiffs' claim, in this Court's view, involves the construction of the Shipping Act and the result depends on the determination of a controversy as to its scope. Cf. *Shulthis* v. *McDougal,* 225 U.S. 561, 569. The claim arises under Agreement No. 8785, which was approved by a federal government agency, the Federal Maritime Commission, and requires consideration of that Commission's rulings. The claim involves, potentially at least, the primary jurisdiction of the Commission. Thus the right of the complainants will be sustained if the laws of the United States and the rules and actions of a federal agency are given one construction and will be defeated if they are given another. See *Bell* v. *Hood,* 327 U.S. 678.

Having determined it had jurisdiction of this case, this Court on March 11, 1966 entered an order that the Federal Maritime Commission had primary jurisdiction to determine the lawfulness and reasonableness of the contested practice under item 11 of Section III; and that proceedings in this Court should be stayed pending administrative action.

April 21, 1966 defendant presented to the Federal Maritime Commission a challenge to the lawfulness and reasonableness of the questioned charges. After hearing by an examiner, the Commission issued its final report and

order under the title *Boston Shipping Association Inc.* v. *Port of Boston*, 10 F.M.C. 409 (1967). Therein the F.M.C. held that assessment of strike storage charges for cargo on the Boston piers during longshoremen's strikes is subject to the Commission's jurisdiction under Section 17 of the Shipping Act, 1916; that a change in the tariff, shifting the charge from the cargo interests to the vessel, did not require prior approval by the Commission under Section 15 of the Act; and that the assessment of the charge against the vessel for cargo which was still in free time (that is, five days following discharge from the vessel) at the commencement of the strike does not constitute an unjust and unreasonable practice under Section 17 of the Act or an undue or unreasonable prejudice under Section 16 of the Act.

No timely appeal was taken from the Commission's order to the Court of Appeals for the District of Columbia.

Swedish Transatlantic Line, which has intervened in this court, on September 4, 1968 filed with the F.M.C. a petition for reconsideration. The F.M.C. dismissed. Swedish Transatlantic sought no review in the District of Columbia.

Thereafter in this court plaintiffs and defendants entered into one stipulation, and plaintiffs, defendants, and the intervenor entered into another. This Court approved both stipulations. No one wished to offer additional evidence.

On the basis of the stipulations, and in the light of what has been recited, this Court summarily concludes as follows.

The matters presented by the complaint are within the primary jurisdiction of the F.M.C. If defendants were not content with the determination of the F.M.C. it was incumbent on them to intervene and to appeal seasonably to the appropriate United States Court, here the Court of Appeals of the District of Columbia. This Court is not the appropriate tribunal to review directly or indirectly the F.M.C.

Even if this Court did undertake a review, it could set aside or ignore the determinations of the F.M.C. only if they were without substantial evidentiary basis, or contrary to the statute or the Constitution. Here the F.M.C. had adequate evidence. Its interpretation of the statute it administers reflects not merely expertness developed from familiarity but a construction that is in accord with what this Court deems a correct understanding of the statute.

There is no merit to the intervenor's various contentions. It will suffice to deal with one, in addition to those already answered. The F.M.C.'s report cannot be regarded as merely advisory. It was a definite decision. And it was a correct one. There is nothing to be gained by this Court traversing once more the ground so satisfactorily covered by the Commission itself, and open to inspection by anyone who cares to read the publications of the Commission.

Plaintiffs shall prepare an appropriate form for declaratory judgment and order, and shall serve on all parties by May 5, 1969.

CHARLES E. WYZANSKI, JR.
Chief Judge

United States Court of Appeals
For the First Circuit

No. 7368.

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, ET AL.,

PLAINTIFFS, APPELLEES,

v.

BOSTON SHIPPING ASSOCIATION, INC., ET AL.,

DEFENDANTS,

REDERI AKTIEBOLAGET TRANSATLANTIC,

DEFENDANT-INTERVENOR, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
WOODBURY,* *Senior Circuit Judge*,
and MCENTEE, *Circuit Judge*.

George F. Galland, with whom *Stephen Moulton*, *Amy Scupi*, *David Stitt*, *Moulton, Looney, Mazzone, Falk & Markham* and *Galland, Kharasch, Calkins & Lippman* were on brief, for appellant.

John M. Reed, with whom *Neil L. Lynch*, *George W. Stuart*, and *Withington, Cross, Park & Groden* were on brief, for appellees.

January 8, 1970.

ALDRICH, *Chief Judge*. The members of the Port of Boston Marine Terminal Association (Terminals), operate pursuant to Federal Maritime Commission Agreement No. 8785, a conference arrangement approved by the Commission under section 15 of the Shipping Act. 46 U.S.C. § 814. Approval permits uniform rates for all "services, facilities, rates, and charges incidental thereto:—wharf-

* By designation.

age, dockage, free time, wharf demurrage, usage charges, passenger charges, water, electricity." The tariffs so established were first filed with the Commission in 1962. Wharf demurrage was therein defined as a storage charge "levied against cargo remaining on a pier or wharf after the expiration of free time." On imported cargo "free time" was the first five days after unloading, an arbitrary period to permit consignees sufficient access to the cargo to satisfy the carrier's obligation to make delivery. If delivery was not taken within the free time, the charge, by accruing against the cargo, became the consignee's obligation.

If access to cargo was prevented by a strike, the demurrage rate was substantially reduced, but it remained as a charge against unloaded cargo. This led to complaints by consignees. By December 1964, through a series of amendments, Terminals changed the tariff to provide that if the consignee's access was prevented by a strike of longshoremen or other agents of the ship, as distinguished from employees of Terminals, the reduced demurrage would be called "strike storage" and charged to the vessel instead of to the cargo. This charge was expressed in broad terms, and resulted in shifting the obligation to the vessel even if the strike did not commence until after the expiration of the free time. The new tariff purported to be immediately effective, and hence was imposed without approval by the Commission.

Appellant Rederiaktiebolaget Transatlantic (Swedish) is a common carrier serving the Port of Boston. On January 8, 9, and 10, 1965, its vessel MATTAWUNGA unloaded cargo in Boston at Mystic Terminals. On January 11 there was a general longshoremen's strike. Longshoremen are employees of the stevedoring concerns which serve all vessels. Tally clerks, who are also agents of the vessel, correspondingly struck. Accordingly there could be no

completed delivery of cargo to consignees who had not called before January 11. Non-delivery was additionally assured because transportation employees serving consignees observe picket lines. Under the 1964 amendments Terminals charged the resultant demurrage to the various vessels. MATTAWUNGA's bill was $8,154. Swedish denied the obligation. Other carriers similarly situated took the same position.

Thereafter Terminals brought an action in the Massachusetts Superior Court for declaratory relief and for payment against Boston Shipping Association (Shipping), representing various vessel owners and agents. Shipping removed the case to the district court. At the suggestion of Terminals the district court ruled that the Commission had primary jurisdiction and entered a stay permitting Shipping to proceed there. Shipping did so, and lost. *Boston Shipping Ass'n, Inc.* v. *Port of Boston Marine Terminal Ass'n*, 1967, 10 F.M.C. 409, hereinafter *Boston Shipping*. It then appealed to the D.C. Court of Appeals, but the appeal was dismissed for late filing. Subsequently Swedish, which was not a member of Shipping, sought to appear before the Commission and to petition for reconsideration.[1] The petition was refused docketing because of lateness. Swedish then sought to intervene as a defendant in the district court proceedings, and that motion was allowed. Upon intervening, Swedish filed an answer raising defenses on the merits. On stipulations of fact the court, without jury, found against all defendants, including Swedish. Swedish, only, appeals.

The first question must concern the jurisdiction of the district court. There is no diversity jurisdiction as to Swedish, for lack of the jurisdictional amount, 28 U.S.C.

[1] Swedish asserted a conflict with *Volkswagenwerk Aktiengesellschaft* v. *FMC*, 1968, 390 U.S. 261, hereinafter *VW*, a case which postdated the *Boston Shipping* decision.

§ 1332. We see no basis for aggregation of the claims against the several defendants. *Cf. Snyder* v. *Harris*, 1969, 394 U.S. 332; *Pinel* v. *Pinel*, 1916, 240 U.S. 594, 596; *Troy Bank* v. *G. A. Whitehead & Co.*, 1911, 222 U.S. 39, 40-41. If this were a suit under a tariff, jurisdiction would automatically attach under 28 U.S.C. § 1337, where the amount involved is of no consequence. *Peyton* v. *Railway Express Agency, Inc.*, 1942, 316 U.S. 350; *Turner, Dennis & Lowry Lumber Co.* v. *Chicago, Milwaukee & St. Paul Ry.*, 1926, 271 U.S. 259, 261. Terminals' tariff was not, however, a tariff in the sense of being within 46 U.S.C. § 817, and was filed with the Commission only as a condition imposed by the prior approval of the conference agreement.[2] We nevertheless find a sufficient federal issue. While it is commonly held that the question must appear on the face of the complaint, *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 1950, 339 U.S. 667; *Louisville & Nashville R.R.* v. *Mottley*, 1908, 211 U.S. 149, the necessity for construing a federal statute may appear by inference. *Cf. Peyton* v. *Railway Express Agency, Inc.*, *supra*. It is true that the complaint did not allege that the change in the agreement had not been approved by the Commission, but neither did it allege approval. Hence we conclude, albeit with some hesitation, that the necessity of approval was raised, and that it sufficiently appeared that a question of construction of the Shipping Act was presented. This is enough to satisfy section 1337.

We turn to this question forthwith, as it constitutes Swedish's most significant defense. Section 15 requires that "modifications," as well as the original agreement, receive the prior approval of the Commission. In *Boston*

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[2] General filing requirements for marine terminal tariffs were added by the Commission's General Order 15, 46 C.F.R. §§ 533.1 *et seq.*, which became effective on October 5, 1965, and hence does not apply here.

Shipping the Commission, without any discussion of the broad language of the act, held that where, under the already approved agreement, there was power to fix charges, a change in incidence, as to who was obligated to pay, was not a modification requiring section 15 filing and approval. In the light of the strictures expressed in *FW*, *supra*, n. 1, this holding seems unsupportable. While, with some consistency, it represented the Commission's past reading of the statute, the Court in *FW* pointed to the "expansive language" of section 15,[3] and the Commission's "extremely narrow view," and specifically rejected the binding effect of the Commission's administrative construction. 390 U.S. 261, 272-73. Then, referring to the statute's "literal provisions," the Court spoke of possible exceptions only in terms of a "*de minimis* or routine character," and stated that even these must be defined by "appropriate administrative proceedings" 390 U.S. 261, 276.

Even this exception could not apply in the case at bar. No administrative proceedings had been held to establish guidelines under which modifications might be found "*de minimis* or routine." Administrative standards cannot be established ex post facto. *Cf. NLRB* v. *Wyman-Gordon Co.*, 1969, 394 U.S. 759; 5 U.S.C. § 553.

We may add, for good measure, that a change in incidence, as distinguished from a change in rate,[4] seems to

[3] The statute requires the filing of "every agreement . . . or modification . . . thereof . . . fixing or regulating transportation rates or fares . . . ." It then provides that the Commission shall approve or disapprove, upon terms stated, and that "before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation . . . ." *See also* n. 4, *infra*.

[4] The Commission's prior view, that all rate changes under such an agreement are without section 15, *Empire State Highway Transp. Ass'n, Inc.* v. *American Export Lines, Inc.*, 1959, 5 F.M.B. 565, *affirmed, Empire State Highway Transp. Ass'n, Inc.* v. *Federal Mari-*

us anything but routine. Even less routine is an unjustifiable change. The Commission expressly found this one "unjust and unreasonable" to the extent that demurrage was to be charged to the vessel even if the strike did not commence until after the expiration of free time, when the vessel's obligation to make the goods available had been fully performed. 10 F.M.C. at 417-18. It would peculiarly violate section 15's "expansive language" to hold that an unreasonable modification could be rewritten nunc pro tunc and saved in part.[5]

We need consider only one other matter, the question of the binding effect of the *Boston Shipping* decision even though erroneous. We are not concerned with the parties to the proceeding, as they did not join in the present appeal. Nor is the question whether the decision was an appropriate approval—to the extent that it was an approval—of demurrage charges incurred after its date. We must hold that the decision did not bind non-parties to charges sought to be imposed for services rendered prior thereto. *See Columbia Broadcasting System, Inc.* v. *United States*, 1942, 316 U.S. 407, 418; Davis, 2 Administrative Law Treatise § 18.05. Any other conclusion would destroy the statutory requirement.

Reversed; judgment for the intervening defendant.

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time Board, D.C. Cir., 1961, 291 F.2d 336, *cert. denied* 368 U.S. 931, fell with the overruling of the Commission in *Pan W*, *supra*. Some changes in rates and charges are now expressly allowable without approval under the 1961 amendment of section 15. This portion is quoted in *Pan W*, *supra*, 390 U.S. at 269-70, n. 16. The Commission did not rely upon that provision, nor do appellees herein.

[5] *See* n. 3, *supra*.